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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 479

JOHN HIX AWTRY,
Petitioner,

v.

THE UNITED STATES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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Supreme Court of the United States

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No.

JOHN HIX AWTRY,

Petitioner,

v.

THE UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioner, John Hix Awtry, prays that a Writ of Certiorari issue to review the final order of the United States Court of Claims of May 10, 1963, and order of the court of June 12, 1964, denying petitioner's motion for rehearing, whereby the claim filed by the petitioner was dismissed in that court.

THE OPINION BELOW

The opinion of the United States Court of Claims (R. 228) printed on page 12 of the Appendix to this Petition of May 10, 1963, is as of yet unreported and the order denying petitioner's motion for rehearing (R. 258),

not reported, is printed on page 22 of the Appendix to this Petition.

JURISDICTION

The judgment of the United States Court of Claims was entered on May 10, 1963. Rehearing was denied June 12, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1255.

QUESTIONS PRESENTED

1. Can the Court of Claims adjudicate a motion for summary judgment under its Rule 51 (as revised December 2, 1957) identical in pertinent part to Rule 56, FRCP, on the basis of mater not contained in the pleadings, depositions, admissions on file, and affidavits?

2. Can an Army officer on active duty be "shanghaied" into serving in a lower rank than he agreed to by the expedient of ordering him to execute an oath of office in such lower rank?

3. Where a statute conditions active duty of a member of the armed forces on his consent, may such consent be implied by a court on a motion for summary judgment in the face of an affidavit denying such consent?

STATUTES INVOLVED

The following statutory provisions are involved:

The Joint Resolution of September 22, 1941, 55 Stat. 728, to authorize temporary appointments of officers in the Army of the United States which provides in pertinent part:

> . . . . during the present emergency, temporary appointments as officers in the Army of the United States may be made, under such regulations as the President may prescribe, from among qualified per-

sons without appointing such persons as officers in any particular component of the Army of the United States. All persons so appointed as officers shall be commissioned in the Army of the United States and may be ordered into active military service of the United States to serve therein for such periods of time as the President may prescribe.

The act of July 25, 1947, 61 Stat. 449, 451, which provides in pertinent part:

> Sec. 2. Notwithstanding the termination date or termination period heretofore provided therefor by law, the following statutory provisions are repealed effective upon the date hereinafter specified, or upon the expiration of a period hereinafter specified, and shall remain in full force and effect until such date or until the expiration of such period. Such statutory provisions are hereby amended accordingly:
>
> a. Repeal effective July 1, 1948:
>
> * * * * *
>
> Act of September 22, 1941, (55 Stat.) 728, Ch. 414, as amended: . . .

The Officer Personnel Act of August 7, 1947, 61 Stat. 795, 907, which provides in section 515(d):

> To the extent provided from time to time by appropriations for this purpose, any officer of any Reserve component of the Army of the United States may, with his own consent, be ordered to active federal duty for such length of time as the President may prescribe and in time of a national emergency expressly declared by Congress may be so ordered without his consent. The President may at any time relieve from active duty any Reserve officer who is serving on active duty. Any officer of any Reserve component ordered into or serving on active duty may, *with his consent*, be temporarily appointed in a grade in the Army of the United States, either higher or lower, than the grade held by him in such Re-

serve component, and such temporary appointment shall not affect the appointment *and* grade held *by* him in his Reserve component. [Emphasis added]

STATEMENT OF THE CASE

The petitioner was commissioned directly from civilian life as a major in the Army of the United States (hereinafter abbreviated AUS) by authority of the act of September 22, 1941, 55 Stat. 728. On April 15, 1944, he was promoted to lieutenant colonel, AUS.

In 1947, following the end of actual hostilities, the Joint Resolution of September 22, 1941, 55 Stat. 728, which created petitioner's office, *inter alia*, was repealed, by the act of July 25, 1947, 61 Stat. 449, effective July 1, 1948. But at approximately the same time the section 515(d) of the Officer Personnel Act of 1947, 61 Stat. 907, authorized the appointment of officers in the AUS, provided: (1) they had a commission in the National Guard of the United States or Officers' Reserve Corps (hereinafter abbreviated ORC); and (2) they consented.

Realizing that it would lose its AUS officers on July 1, 1948, the Army required that all AUS officers not already holding an ORC appointment must be separated from the service unless they held an appointment in the National Guard of the United States or applied for an ORC appointment.

On February 19, 1948, the petitioner submitted an application for an appointment as colonel, ORC. Such application was approved on February 20, 1948.

Also, in order to provide for the retention of officers after the date of July 1, 1948, the Army issued a Circular 27 entitled, *Extended Active Duty*. Under this circular, certain volunteer categories for continued active duty as well as for recall to active duty were provided. Such circular is not published in the Code of Federal Regula-

tions or otherwise generally available to the public. And although interpretation of the circular unquestionably forms a keystone in the decision of the Court of Claims, the circular was never introduced into evidence at the Court of Claims. It was, however, referred to by way of the briefs of the petitioner and respondent. Thus we see on pages 86 and 87 of the record the following quotations from Circular 27:

> 18. *Eligibility*—To be eligible for extended active duty in categories as set forth in Section II the applicant must: * * * *
>
> c. *agree to accept active duty in a grade not higher than that in which the applicant served in the Army of the United States immediately prior to processing for relief from active duty.* [Emphasis supplied]

Much the same is cited without emphasis on page 34 of the record by the petitioner's brief.

The difficulty of the above cited portion from Circular 27 is that it was applicable only to officers who had already been relieved from active duty and desired to be recalled and was in a section that had no application at all to officers such as the petitioner who already were on active duty. If the Court of Claims had had the entire regulation before it, this circumstance would have been abundantly apparent. The reason for the difference between officers on active duty and those who had been relieved from active duty was that the latter frequently received terminal leave promotions which the former had not and it would have been unfair to bring them back a grade higher than those who had remained on active duty. As a matter of fact, the petitioner was too old under the terms of the circular to be recalled to active duty had he been relieved.

The petitioner did not object overly to remaining on active duty but desired to do so in the grade of colonel rather than lieutenant colonel. The Army wanted to hold

him. He was Chief of the War Fraud Unit and active in the May-Garsson Brothers and General Meyers fraud cases, among many others. (R. 59)

On March 18, 1964, the petitioner volunteered to continue on active duty three years, but submitted therewith a covering letter in which he specifically referred to a discussion which he had had with the Office of the Judge Advocate General and General Brandon concerning the matter. (R. 101-102)

Now at this point, although the petitioner had volunteered to remain on active duty for a period of three years, it is to be appreciated that by law his commission as a lieutenant colonel, AUS, would be automatically terminated July 1, 1948, and at that time the only commission which he would legally hold would be as a full colonel, ORC. Further, because of the express language of Section 515(d) of the Officer Personnel Act of 1947, the petitioner could not have been appointed legally in any AUS grade below that of colonel *without his consent.* But, *irrespective of the expressed terms of Section 515(d) requiring consent,* by special orders No. 117 and 120, dated June 11, 1948, and June 15, 1948, officers in the status of the petitioner were "hereby temporarily appointed" to the AUS grade in which serving on June 30, 1948. The special orders stated "new oaths of office for these officers will be administered."

In accordance with such special orders an oath of office *was* administered to the petitioner. But it will be noted that by affidavit (R. 61) the petitioner regarded the delivery of the appointment and oath of office as a *military order* to remain on active duty which he could not properly refuse to obey and consequently he exectued the oath of the office on June 30, 1948.

The petitioner continued on active duty. Finally, through the extraordinary intervention of President Tru-

man, on January 13, 1953, the petitioner was appointed to the grade of colonel.

The instant suit was brought in the Court of Claims under 28 USC, Section 1491 for the difference in pay between the grades of lieutenant colonel and colonel for the period of July 1, 1948 to January 12, 1953.

In the Court of Claims after the respondent's answer was filed, the petitioner moved for a summary judgment. The main thrust of the petitioner's argument was that the ordering of the petitioner to execute a new oath of office and giving him an appointment without any opportunity to object was, in itself, sufficient to negate consent unless an "express consent" can be shown. The respondent's position on this was that the petitioner did generally consent and as a basis therefor he cited a portion from an Army Circular No. 79 and also from the aforementioned Army Circular No. 27 (R. 86). But quite aside from the quotation being out of context and having no application to petitioner *neither of these documents were ever introduced into evidence by way of the pleadings, depositions, admissions on file, or affidavits.*

Nevertheless, the Court of Claims held in favor of the respondent citing these very same Circulars Nos. 79 and 27 which were not in evidence (R. 231) and stated (R. 232):

> These instructions are quite clear. If plaintiff desired to remain on active duty after April 30, 1948, he must "agree to accept active duty" in a grade not higher than lieutenant colonel. Such service would therefore be voluntary.

And further on, the Court states:

> There is not the slightest hint in the record that the plaintiff, on June 30, 1948, was an unwilling recipient of the appointment, or indeed, that he could not

have refused the commission and separated himself from the service.

The latter statement is made even though the petitioner had by affidavit stated that he regarded the delivery of the appointment and oath of office as a military order which he could not properly refuse to obey. (R. 61)

REASONS FOR GRANTING THE WRIT

1. The Court of Claims Has So Far Departed From The Accepted and Usual Course of Judicial Proceedings As To Call For An Exercise Of This Court's Power of Supervision.

On the basis for granting a motion for summary judgment, the applicable rules of the Court of Claims and the United States District Courts are identical. The Supreme Court of The United States has consistently taken a conservative attitude with respect to the granting of a motion for summary judgment. A typical pronouncement is set forth in the case of *Poller* v. *Columbia Broadcasting System*, 368 U.S. 464, wherein on page 468 the Court stated:

> Summary judgment should be entered only when the pleadings, depositions, affidavits, and admissions filed in the case "show that [except for the amount of damages] there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), Fed. Rules Civ. Proc. This rule authorized summary judgment "only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, . . . [and where] no genuine issue remains for trial . . . [for] the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try."

Attention is also invited to the following cases: *Free* v. *Bland*, 369 U.S. 663; *U.S.* v. *U.S. Gypsum Co.*, 340 U.S.

76; *Fountain v. Filson*, 336 U.S. 681; *International Salt Co.* v. *U.S.*, 332 U.S. 392; *Elgin, J.&E. Ry. Co.* v. *Burkley*, 325 U.S. 711; *Sartor* v. *Ark. Natural Gas Corp.*, 321 U.S. 620.

The Court of Claims decision recognizes that the issue revolves around the question of consent. It was the petitioner's contention that consent was absent unless shown. Indeed, it is not understood how without the erroneous factual basis for the Court of Claims decision, the petitioner's appointment as an AUS lieutenant colonel can be justified in view of the law. But assuming that some important aspect of evidence may have been possibly overlooked, still, it was manifestly improper for the Court of Claims to grant respondent's motion for summary judgment and thereby deny the petitioner his day in court to present evidence that the AUS appointment was not, in fact, voluntary or with his consent.

There is a broad breach from finding as a *matter of law* that an appointment was without the petitioner's consent and on the other hand finding as a *matter of law* that the appointment was with his consent. The petitioner should be entitled to present such evidence as he may have which will show a consistent pattern of protest to superior officers to the effect that his appointment as a lieutenant colonel was to be vacated and that he was entitled to serve in the grade of colonel. But the Court of Claims has denied him this and the Court has done so not only without giving him a hearing but also apparently without considering his affidavits and basing its decision upon a matter which was not even in evidence. This failure to provide the petitioner with his due process represents a laxity which, it is submitted, cannot be overlooked.

Further evidence of the inept manner in which the Court of Claims appears to have considered this case may

be seen from the footnote on page 2 of the slip opinion (R. 228) wherein it is stated that the petitioner recognized that his claim from July 1, 1948 to July 31, 1951, was barred by the six-year statute of limitations since the Petition was filed August 29, 1957. This is clear error of law since pursuant to Section 205 of the Soldiers' and Sailors' Civil Relief Act, as amended, 54 Stat. 1181, 56 Stat. 770, 50 App.USC 525, the statute of limitations was tolled until petitioner's retirement, April 1, 1953. Although this was clearly pointed out to the Court (R. 253), no correction was made.

2. This Case Sets Up Guidelines To Effect Involuntary Retention of Members Of The Armed Services Which Should Not Be Tolerated.

In this case, the Army blatantly appointed officers it desired to retain in AUS grades without their consent and required that new oaths of office for such officers be administered. It was a shabby trick. It placed officers such as those in the petitioner's position in the awkward situation wherein they either had to disobey orders and risk court-martial or follow orders and do what they could to rectify the illegal act subsequently. For the petitioner the situation was particularly awkward. He had been in charge of the War Frauds Unit and made many high enemies. It is basic military law that orders, even though they may be considered unlawful, are disobeyed at peril. Disobedience could have brought a court-martial and dismissal if the order was considered legal whereas obedience was merely an affirmation to support the Constitution and otherwise was a useless act if it was accorded illegal. At the time and place no lawyer worth his salt would have advised the petitioner to disobey the order. The advice would have been to obey but protest, which is exactly what the petitioner did and has continued to do.

In the instant case, only a few officers were involved. However, why could this not be applied to the entire Army? Orders could be issued that all would be required to extend or serve in a lower grade after a certain date and that new oaths of offices would be required. Those who protested would find themselves in jeopardy. Although justice might eventually out for them, there would undoubtedly be a considerable period of uncertainty. For those who did not protest by way of court action or refusal to serve, the Army could merely point to the instant case, *Awtry* v. *United States*, and state that consent was implied. Service in the Armed Forces, whatever may be its merits otherwise, constitutes a type of servitude for a period of time. It is submitted that any extension of the period of servitude beyond that authorized by law should have a more solid legal basis than the implied consent doctrine herein espoused by the Court of Claims.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES COURT OF CLAIMS

No. 420-57

(Decided May 10, 1963)

JOHN HIX AWTRY v. THE UNITED STATES

Thomas M. Gittings, Jr. for plaintiff. *King & King* were on the briefs.

William L. Davis, with whom was *Acting Assistant Attorney General Joseph D. Guilfoyle*, for defendant. *Edgar H. Twine* was on the briefs.

Before JONES, *Chief Judge*, WHITAKER, LARAMORE, DURFEE and DAVIS, *Judges*.

ON PLAINTIFF'S AND DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT

DURFEE, *Judge*, delivered the opinion of the court:

Plaintiff sues to recover the pay of an Army colonel for the period August 1, 1951, to January 13, 1953, less the pay of a lieutenant colonel which he actually received. The matter is before us on cross-motions for summary judgment.

John Hix Awtry served on active duty as a commissioned officer in the Army of the United States from September 5, 1942, through March 31, 1953. On April 15, 1944, he was promoted to lieutenant colonel. In February 1948 he was appointed a colonel in the Officers' Reserve Corps while retaining his commission as a lieutenant colonel on active duty. Plaintiff asserts that on July 1, 1948, this latter commission expired. He continued to serve on active duty, however, until January 13, 1953, at which time he received, by Presidential request, an active duty commission as a colonel. Plaintiff concludes that between July 1, 1948, and January 13, 1953 his active duty must have been served as a colonel also.[1]

Plaintiff's claim depends upon acts done or effected on June 30 and July 1, 1948. He received his appointment as lieutenant colonel in 1944 under the Act of September 22, 1941, ch. 414, 55 Stat. 728. The Act of July 25, 1947, ch. 327, 61 Stat. 449 repealed this prior legislation, effective July 1, 1948. The question arose, did the repeal only extinguish the power to make additional military appointments under the 1941 Act, or did the repeal also terminate, on June 30, 1948, all appointments theretofore made under the Act? In order to avoid this latter interpretation of the repealing legislation, the Army sought to reappoint the officers affected. Plaintiff claims that the 1947 Act did, in fact, nullify his commission as lieutenant colonel, and further, that the Army's attempt, on June 30, 1948, to reappoint him for another 3 years was unlawful. Plaintiff did continue on active duty. He argues that the only valid commission he held after July 1, 1948, was that of a colonel in the Officers' Reserve Corps, and therefore he could only have been a colonel during his extended active duty. Plaintiff presents alternative

[1] Plaintiff recognizes that his claim for the period July 1, 1948, through July 31, 1951, is barred by the 6-year statute of limitations, 28 U.S.C. § 2501. Plaintiff's original petition was filed August 29, 1957.

grounds upon which to recover colonel's pay which will be considered in Part II of this opinion.

Assuming, for argument's sake, that plaintiff's 1944 appointment terminated June 30, 1948, we turn to his reappointment as a lieutenant colonel on that same day. If this new commission is legal and effective, plaintiff's first ground for recovery is precluded.

Plaintiff's new active duty commission was given him under the provisions of the Officer Personnel Act of August 7, 1947, ch. 512, 61 Stat. 795. Section 515(d) of this statute provided in part (p. 907):

> • • • Any officer of any Reserve component ordered into or serving on active duty may, *with his own consent*, be temporarily appointed in a grade in the Army of the United States, either higher or lower than the grade held by him in such Reserve component, and such temporary appointment shall not affect the appointment and grade held by him in his Reserve component. [Emphasis supplied.]

Plaintiff fitted properly into the terms of this section. He was an officer, a colonel, in a Reserve component. He was appointed to active duty in the Army of the United States in a grade lower—that is, lieutenant colonel, than the grade held by him in such Reserve component. The controversy concerns the statutory language "with his own consent." Plaintiff asserts that the Army issued and followed special orders which denied plaintiff the right or opportunity to give his consent to the appointment, and that while serving on active duty on June 30, 1948, he was "ordered" to accept the new appointment. Defendant argues that the Army did obtain from plaintiff sufficient consent to this commission.

Pursuant to section 515 of the Officer Personnel Act of August 7, 1947, cited above, the Army issued paragraph 7 of Special Order No. 120, June 15, 1948, which provided in pertinent part as follows:

7. By direction of the President, paragraph 26b, Special Orders 117, Department of the Army, 1948, is amended to read:

> b. DP officers of the Army of the United States who on 30 June 1948 are serving on active duty in temporary grades lower than their permanent grades in * * * the Officers' Reserve Corps * * * are hereby temporarily appointed effective 30 June 1948 under the provisions of section 515 Officer Personnel Act of 1947 in the same temporary grades in which they are serving on 30 June 1948. DP officers so appointed are continued on active duty in new temporary grades. Dates of rank will remain unchanged. New oaths of office for these officers will be administered on 30 June 1948 or as soon thereafter as practicable and forwarded to The Adjutant General. A notation "Aptd by Par. 26, SO 117 DA 1948 as amended by Par 7 SO 120" will be made on each oath of office form at the left of the signature. * * * Nothing in this order will be construed as making a change to a grade higher or lower than the temporary grade in which the affected personnel are serving on 30 June 1948.

This order was applicable to plaintiff, and under it, he was given his June 30, 1948, commission as lieutenant colonel. This Special Order did not state in words that plaintiff's "express consent" must first be obtained before he would be commissioned. Neither did the Officer Personnel Act of 1947, section 515(d), *supra*, demand plaintiff's "express consent." Section 515(d) provided that the appointment be made "with his own consent." These general words do not prescribe any special form of acceptance. They express the intention of the Congress that the appointments be offered and accepted voluntarily, not imposed, but it was left to the military authorities to carry out this intention of the Congress. If plaintiff and other candidates knew or should have known that the commissions were voluntary, and if they were given

sufficient opportunity to refuse the commissions, we must hold that the Army sufficiently complied with the controlling statutory law.

There is little, if any, evidence in the record that plaintiff was obliged to accept the new commission or that the Army imposed a commission on an unwilling plaintiff or on any other man (on June 30, 1948). There is no evidence that he attempted to reject the commission, or that any attempt on his part to refuse the commission would have been rebuffed. There is evidence that plaintiff was quite willing to serve as a lieutenant colonel for 3 more years, and that he was in fact given the opportunity to refuse the appointment if he so desired.

On December 29, 1947, the Department of the Army issued Circular No. 79, which implemented section 515 of the Officer Personnel Act of 1947. This circular, paragraph 5, stated that officers such as plaintiff would be separated from the service before April 30, 1948, unless their continued service "is voluntary." Paragraph 5 further stated that "Officers who have signed a voluntary category statement * * * will be considered to have volunteered to serve * * *" after such date. Circular No. 27, dated February 2, 1948, amplified Circular No. 79 by stating that eligibility for the "extended active duty in categories" is conditioned upon the applicant's

> agree[ment] to accept active duty in a grade not higher than that in which the applicant served in the Army of the United States immediately prior to processing for relief from active duty.

These instructions are quite clear. If plaintiff desired to remain on active duty after April 30, 1948, he must "agree to accept active duty" in a grade not higher than lieutenant colonel. Such service would therefore be voluntary.

Without any military command or obligation, plaintiff, on March 19, 1948, submitted a request for retention on

extended active duty as a lieutenant colonel under Category III. Had he not done so he would presumably have been separated from the service before April 30 or by June 30. Defendant's Exhibit No. 2B is the Category Statement signed by plaintiff. On it there are listed Categories I, II, III, and V. Category III states "I elect to continue on extended active duty for three (3) years." Categories I and II are the same except that they are for one and two years respectively. Category V states "I desire relief from active duty at the earliest opportunity." There is no question but that this request by plaintiff was at his own election. He could have chosen to separate himself from the service, but he did not. On July 30, 1951, he again requested another 3-year category extension. But plaintiff argues that on June 30, 1948, 3½ months after he submitted his Category III request, he was obliged to take a new commission under Special Order 120, *supra*, as lieutenant colonel for 3 years. His complaint seems to be that he was forced to accept substantially what he had volunteered for a few months earlier. He was, evidently, content to extend his existing commission as lieutenant colonel for 3 more years, but he would not serve the same 3 years in the same grade under a new commission. All this, however, is hindsight. There is not the slightest hint in the record that plaintiff, on June 30, 1948, was an unwilling recipient of the appointment, or indeed, that he could not have refused the commission and separated himself from the service.

The oath of office plaintiff took on June 30 had instructions on the reverse side which stated that this oath will be executed "upon the acceptance of a commission or appointment in the Army." Paragraph 5 of the instructions states:

> Immediately upon receipt of a commission or notification of appointment, the appointee will, in case of acceptance of the commission or appointment, return to The Adjutant General the oath of office on

this form properly filled in, subscribed, and attested. *In case of non-acceptance*, the commission or notification of appointment will be returned to The Adjutant General by a letter indicating the fact of non-acceptance. [Emphasis supplied.]

These directions on the oath of office indicate that plaintiff could have accepted or rejected the appointment. He took the oath and signed it. We must conclude, therefore, that plaintiff was constituted a lieutenant colonel "with his own consent." The record does not substantiate plaintiff's claim that he reasonably believed that he had to accept the new commission, and that the Army offered him no opportunity to refuse it. The evidence is almost all to the contrary.

II

Plaintiff presents an alternative claim which concerns the failure of two Army selection boards to recommend him for promotion, while on active duty, to the rank of colonel. The first selection board convened on or about January 8, 1952, and the second in August of 1952. Plaintiff seeks to recover the pay of a colonel from January 8, 1952, to January 13, 1953, when he was appointed a colonel by Presidential request, less the pay of lieutenant colonel which he actually received.

Plaintiff contends that these boards arbitrarily passed him over for promotion; that they were unlawfully assembled because there were less than five members appointed to them; that they were not made up predominantly of members of the Judge Advocate General's Corps, and that one of the men on the second board also served on the first. Defendant has asked for a summary judgment in its favor on this alternative claim. Plaintiff urges that he be allowed to prove these allegations before a commissioner because they raise an essential question of fact.

It must be noted that the selection board does not promote any man. Its sole function is to choose the men who will be promoted *if and when* a vacancy occurs in the ranks. If a man is chosen by a selection board and placed on a promotion list, there is no guarantee that he will in fact be promoted. Certainly there is no guarantee when he will be promoted. This points up the problem with plaintiff's second claim in this proceeding. He is in fact asking for more than he would have received had he been picked by the first selection board and none of the alleged illegalities existed. He is asking for the pay of a colonel beginning on the day the selection board first met.

The objections of plaintiff to the selection boards which considered his eligibility for promotion are based upon a contention that the number and status of the board members do not meet the requirements of section 507(a)(3) of the Officer Personnel Act of 1947. These provisions are expressly applicable only to promotions *in the Regular Army.*

Army Regulation 605-12-1948 provides for temporary promotions *in the Army of the United States* officers on active duty, and states that promotions thereunder "will be based upon the provisions of the Officer Personnel Act of 1947."

The requirements of the Act for "Temporary Appointment of Officers in the Army of the United States" are provided under section 515 thereunder and it is to this part of the Officer Personnel Act that the regulation refers, not to the requirements of section 507, except only as to promotion of general officers in the Army of the United States, where Section II of AR-605-12 provides that temporary promotions of brigadier generals and major generals shall be by boards of at least five members *as prescribed in section 507, The Officer Personnel Act of 1947.* Section III of the same Regulation prescribes that selection boards for temporary promotions to major, lieutenant

colonel and colonel "will be composed of not less than three nor more than five officers."

The absence in the regulation of any reference to promotion under section 507 of the Act of 1947, except as expressly limited; the inclusion of the requirements as to temporary promotions in section 515 of the Act, and the specific procedural provisions of the regulation herein cited, establish that the number and status of the members of selection boards for temporary promotions in the Army of the United States on active service is not prescribed by, or required to comply with the provisions of section 507 of the Officer Personnel Act of 1947.

Apart from the alleged irregularities in the constitution and conduct of the selection boards, plaintiff must at least allege facts which demonstrate that he has been damaged by the events of which he complains. There should be a showing that at some reasonably ascertainable time, plaintiff would in fact have been promoted, provided he had been previously selected for promotion.

Defendant has placed before us uncontroverted statements of fact which demonstrate that if plaintiff's name had been placed on the promotion list by the first board, he would have been promoted to colonel no sooner than May 12, 1953. Section 10 of Army Regulation 605-12, "Commissioned Officers, Temporary Promotions in the Army of the United States," dated September 30, 1948, which governed the promotion scheme applicable to plaintiff, provided:

> Eligible list for promotion.—a. The Department of the Army (and major commanders specified in par. 13) will maintain eligible lists of the officers who have been selected for promotion based on the selection board's recommendations. The names of officers selected will be included in these lists in the same order as they appeared on the selection list which was submitted to the board.

b. Officers will be promoted in the order that their names appear on these eligible lists and as vacancies occur.

Plaintiff's name appears as No. 13 on the "selection list which was submitted to the board." A Lieutenant Colonel Loos was No. 12 on this list. He was selected to be promoted. If plaintiff had been likewise chosen, his name would have been placed on the eligible list after Lieutenant Colonel Loos. Loos was promoted on May 12, 1953. Plaintiff was promoted by Presidential order on January 13, 1953.

Plaintiff has failed to controvert these facts which show that he has not been damaged by the failure of the selection board to approve him for promotion.

Defendant's motion for summary judgment is granted. Plaintiff's motion is denied, and his petition is dismissed in its entirety.

UNITED STATES COURT OF CLAIMS

No. 420-57
No. 346-59
No. 142-60
No. 18-61
No. 19-61
No. 218-61

JOHN HIX AWTRY; CARRIER CORPORATION, ETC.; CHESTER G. BETHKE, PAUL D. AND WINONA E. EDELMAN; MINERS NATL. BANK OF WILKES BARRE, ETC.; JOSEPH M. MURPHY

vs.

THE UNITED STATES

Clerk's Office
Washington, D. C., 12 June 1964

To Attorney of Record and Assistant Attorney General,

and Commissioner .....

Sirs:

Please take notice that in the above-entitled causes there has been entered this day on the { plaintiff's / defendant's } motions for rehearing, etc. the following order: These cases come before the court on motions for rehearing, reconsideration, reversal of the order denying plaintiff's motion for summary judgment and for new trial under Rules 68 and 69 of the Rules of this court and, on consideration thereof,

IT IS ORDERED this twelfth day of June, 1964, that said motions be and the same are denied.

Very truly yours,

FRANK T. PEARTREE
Clerk, Court of Claims.

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 479

JOHN HIX AWTRY, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (Pet. App. 12; R. 258) is not yet reported.

JURISDICTION

The judgment of the Court of Claims was entered on May 10, 1963. A timely motion for rehearing was denied on June 12, 1964. The petition for a writ of certiorari was filed on September 10, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1255.

QUESTION PRESENTED

Whether the Court of Claims properly found that petitioner's 1948 appointment as a lieutenant colonel in the Army of the United States was "with his own consent" within the meaning of Section 515(d) of the Officer Personnel Act of 1947, 61 Stat. 795, 907.

STATUTES INVOLVED

1. The Joint Resolution of September 22, 1941, 55 Stat. 728, 729, provides in pertinent part:

> . . . during the present emergency, temporary appointments as officers in the Army of the United States may be made, under such regulations as the President may prescribe, from among qualified persons without appointing such persons as officers in any particular component of the Army of the United States. All persons so appointed as officers shall be commissioned in the Army of the United States and may be ordered into the active military service of the United States to serve therein for such periods of time as the President may prescribe. * * *

2. Section 2 of the Act of July 25, 1947, 61 Stat. 449, 451, provides in pertinent part:

> Sec. 2. Notwithstanding the termination date or termination period heretofore provided therefor by law, the following statutory provisions are repealed effective upon the date hereinafter specified, or upon the expiration of the period hereinafter specified, and shall remain in full force and effect until such date or until the expiration of such period. Such statutory provisions are hereby amended accordingly:

a. Repeal effective July 1, 1948:

* * * *

Act of September 22, 1941 (55 Stat. 728, Ch. 414), as amended: . . .

3. Section 515(d) of the Officer Personnel Act of August 7, 1947, 61 Stat. 795, 907, provides:

> To the extent provided from time to time by appropriations for this purpose, any officer of any Reserve component of the Army of the United States may, with his own consent, be ordered to active Federal duty for such length of time as the President may prescribe and in time of a national emergency expressly declared by Congress may be so ordered without his consent. The President may at any time relieve from active duty any Reserve officer who is serving on active duty. Any officer of any Reserve component ordered into or serving on active duty may, with his own consent, be temporarily appointed in a grade in the Army of the United States, either higher or lower than the grade held by him in such Reserve component, and such temporary appointment shall not affect the appointment and grade held by him in his Reserve component.

STATEMENT

This action was brought by petitioner in the Court of Claims to recover, for the period between August 1, 1951 and January 13, 1953,[1] the difference between

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[1] The apparent basis for the court's conclusion that this is the relevant period is the following quotation from petitioner's "Motion for Summary Judgment and Brief in Support There-

the pay of a colonel and that of a lieutenant colonel (which he actually received). Petitioner's theory is that he was not serving under a valid appointment as a lieutenant colonel during the period in question and, therefore, must be deemed to have been serving under his appointment as a colonel in the Officers' Reserve Corps. The relevant facts are undisputed.

Petitioner served on active duty as a commissioned officer in the Army of the United States from September 5, 1942, through March 31, 1953. On April 15, 1944, he was promoted to lieutenant colonel. In February 1948 he was appointed a colonel in the Officers' Reserve Corps while retaining his commission as a lieutenant colonel on active duty. On March 19, 1948, petitioner submitted a request for retention on extended active duty for three years as a lieutenant colonel. In the absence of this request, he would presumably have been separated from the service by June 30, 1948 (Pet. App. 13, 16-17).

When Congress passed the Act of July 25, 1947, 61 Stat. 449, effective July 1, 1948 (p. 2, *supra*) which repealed the Joint Resolution of September 22, 1941, 55 Stat. 728 (p. 2, *supra*) (under which petitioner was originally commissioned and promoted to lieutenant colonel in 1944), the Army sought to protect its officers against the possibility that the repealer would be viewed as terminating all appointments made under the Joint Resolution; it did this by

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of" (p. 3) in the Court of Claims: "The plaintiff recognizes that the recovery of this pay for the period from July 1, 1948 through July 31, 1951 is barred by the 6-year statute of limitations, 28 U.S.C. § 2501."

reappointing affected officers. Pursuant to Section 515(d) of the Officer Personnel Act of August 7, 1947, ch. 512, 61 Stat. 907 (p. 3, *supra*), the Army issued paragraph 7 of Special Order No. 120, June 15, 1948, which provided in pertinent part as follows:

> 7. By direction of the President, paragraph 26b, Special Orders 117, Department of the Army, 1948, is amended to read:
>
> b. DP officers of the Army of the United States who on 30 June 1948 are serving on active duty in temporary grades lower than their permanent grades in * * * the Officers' Reserve Corps * * * are hereby temporarily appointed effective 30 June 1948 under the provisions of section 515 Officer Personnel Act of 1947 in the same temporary grades in which they are serving on 30 June 1948. DP officers so appointed are continued on active duty in new temporary grades. Dates of rank will remain unchanged. New oaths of office for these officers will be administered on 30 June 1948 or as soon thereafter as practicable and forwarded to The Adjutant General. A notation "Aptd. by Par. 26, SO 117 DA 1948 as amended by Par 7 SO 120" will be made on each oath of office form at the left of the signature. * * * Nothing in this order will be construed as making a change to a grade higher or lower than the temporary grade in which the affected personnel are serving on 30 June 1948.

This order was applicable to petitioner; under it, he was given, and he accepted on June 30, 1948, an active duty commission as a lieutenant colonel (Pet. App. 15).

In the court below, petitioner urged that this commission was invalid because it was not "with his own consent" within the meaning of Section 515(d) of the Officer Personnel Act. This contention was rejected by the Court of Claims. Concluding that Section 515(d) did not require the officer to consent expressly to the receipt of a commission, the court ruled that there was no substance to petitioner's "claim that he reasonably believed that he had to accept the new commission, and that the Army offered him no opportunity to refuse it" (Pet. App. 18). Accordingly, on cross-motions for summary judgment, the court granted the government's motion and denied that of petitioner.

ARGUMENT

The decision of the Court of Claims is correct, and it does not in any event present a question of general importance. Review by this Court is not warranted.

On the basis of the undisputed facts, the court properly concluded that petitioner's appointment as a lieutenant colonel met the requirements of Section 515(d) of the Officer Personnel Act (p. 3, *supra*). As noted above, in March 1948 petitioner made an express election to continue on extended active duty as a lieutenant colonel for three additional years. This election was made, as the court below said (Pet.

App. 16), without "any military command or obligation."

It follows that, when petitioner was appointed a lieutenant colonel in June 1948, the appointment was pursuant to petitioner's own written election made just three months earlier—an election which petitioner does not claim was repudiated by him. Moreover, the oath of office which petitioner executed in connection with his new appointment contained instructions that, if the officer did not accept the commission, it should be returned accompanied by a letter indicating the fact of non-acceptance. Petitioner did not follow this course of action; rather, he signed the oath of office and thus indicated his acceptance of the commission.

In these circumstances, petitioner's contention that his June 1948 appointment was without his consent is insubstantial. It is difficult to see how petitioner could have more clearly manifested his agreement to the appointment short of executing a paper which expressly stated his consent. There is, of course, nothing in the Officer Personnel Act which requires that the officer's consent be manifested in any particular manner.

Petitioner's position is not advanced by his claim that his election in March 1948 to continue on extended active duty was made pursuant to Army circulars which had no application to him. The issue here is not whether he was properly called upon to make an election. Rather, it is whether the election manifested a willingness on petitioner's part to continue on active duty as a lieutenant colonel; *viz*,

whether the requisite consent was present.[2] And, even if the March 1948 election were to be disregarded, petitioner would still be confronted with the fact that the written oath of office sent to him in terms gave him the choice of accepting or rejecting the appointment. Having elected to accept it, he can scarcely be heard to insist now that the appointment was without his consent.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

JOHN W. DOUGLAS,
Assistant Attorney General.

ALAN S. ROSENTHAL,
Attorney.

October 1964.

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[2] For this reason, it is of no significance that the Army circulars may not have been in evidence. While referring to those circulars, the court below used them only to determine what petitioner was expressing a willingness to do in his written election (which was part of the record).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 179

JOHN HIX AWTRY,
Petitioner,

v.

THE UNITED STATES,
Respondent.

REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

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JOHN HIX AWTRY,
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THE UNITED STATES,
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REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

The Brief for the United States in Opposition submitted by the Solicitor General of the United States is amazingly inaccurate. Having recognized in a backhanded way on page 7 of the Opposition that the Army circulars which plainly formed the basis for the Court of Claims decision were not even properly before such court on the motion for summary judgment, the Solicitor General has attempted to justify the decision by demonstrably gross misinterpretations of that evidence which was of record.

On pages 4 and 6 of the Opposition, the statement is made: "The relevant facts are undisputed." Nothing could be farther from the truth.

On pages 4 and 6 of the Opposition, it is alleged that the petitioner in March of 1948 made an express election to continue on extended active duty "as a lieutenant colonel" for three years. There is no basis in the record for this statement. It is false. At the time that the petitioner elected to remain on active duty, he did so only as to time, not grade. He then had two commissions. One was as a colonel in the Officers Reserve Corps, conferred under one act of Congress, and the other was as a lieutenant colonel, Army of the United States, conferred under an earlier act of Congress which would expire June 30, 1948. Petitioner's election for retention made *no* reference to the grade in which he would be retained (R. 101). And the law clearly provided that he could not be retained in a grade lower than that of his grade in the Officers Reserve Corps *without his consent*. Petitioner is not clairvoyant. He could not foresee that the Army would unilaterally retain him on active duty in a grade lower than his Reserve grade.

The assumption of the Solicitor General on page 4 of the Opposition that in the absence of petitioner's request (actually an election for a period of time only) he would have been separated by June 30, 1948, is purely speculative and is not supported by one shred of evidence. See *Miley* v. *Marshall, et al.*, 100 F. Supp. 1012, *affirmed*, 193 F. 2d 712.

The statement of the Solicitor General on page 7 of his Opposition misrepresents. Here he says:

> ". . . . [T]he oath of office which petitioner executed in connection with his new appointment contained instructions that, if the officer did not accept the commission, it should be returned accompanied by a letter indicating the fact of non-acceptance."

From the above the Court might imply that the petitioner was tendered a commission which he had the election to return with a letter indicating the fact of such

non-acceptance. But no commission, or any other scrap of paper, for that matter, was ever presented, offered or tendered to petitioner. The "it" to be returned in line 4 of the above quotation from the Solicitor General is "the commission or notification of appointment" *not* the oath of office. The notification of appointment was contained within Special Order 117. The Order gave no alternatives but compliance. Oaths of office "will be administered," it says (Opp. 5). The Solicitor General is silent on just how compliance with this Order could have been avoided —to say nothing about the absurd proposition that Special Order 117 somehow could have been returned by petitioner.

If this is not sufficient to dispose of the matter, one need only look at the oath form (R. 109) and it is immediately apparent that the *same* form is used for the oath of office administered to civilians who are initially commissioned into the Army. The form *does not* set forth that there is any election on the part of an appointee to accept or not accept. While in paragraph 5 of the fine print, the instructions state "in the case of non-acceptance, the commission or notification of appointment will be returned to the Adjutant General by a letter indicating the fact of non-acceptance," there is no indication that this was directed to the petitioner. The natural assumption is that this part of paragraph 5 is directed to the officer who administers the oath where a person such as a civilian refuses to take the oath. In such case, the commission is returned. That is all that it says.

Still further, it is to be noted that the petitioner merely acknowledged that he had been *appointed* as a lieutenant colonel in the Army of the United States (which had already been given without his consent) and swore to support and defend the Constitution of the United States. How could any active duty soldier refuse to swear to such effect? Rejecting the unwanted appointment is one

thing; refusing to support and defend the Constitution is quite another. It is difficult to conceive how such an oath is sufficient to imply the statutorily required consent of the petitioner to serve in a grade lower than his grade in the Officers Reserve Corps. Particularly is this so when the implication should rise to the level of a legal conclusion in the face of petitioner's affidavit to the contrary.

The petitioner has no objection to the oath, per se. He will take it whenever asked and live by it until the day he dies. It is the appointment in the lower grade to which he objects. Here he should have been given an option; not an order.

On page 6, the Solicitor General says that the petitioner "was given, and he accepted on June 30, 1948, an active duty commission as a lieutenant colonel." On what evidence in the record does the Solicitor General base this statement? The only evidence of the commission was the "Order." Petitioner didn't accept it. He obeyed it.

It is also to be noted that on page 3 of the Opposition, the Solicitor General starts off the Statement to the effect that the action was brought in the Court of Claims to recover for the period between August 1, 1951, and January 13, 1953. Apparently the Solicitor General has not reviewed the pleadings filed in the Court of Claims which plainly show the period for recovery to be from July 1, 1948, to January 13, 1953. As pointed out on page 10 of the petition to this Court, the conclusion by the Court of Claims that part of the claim is barred by the statute of limitations is directly contrary to Section 205 of the Soldiers and Sailors Civil Relief Act, as amended, 54 Stat. 1181, 56 Stat. 770, 50 App. U.S.C. 525 which suspended the statute of limitations during petitioner's period of active duty. Express statutory provisions should not be ignored merely to assuage embarrassment—whatever the source. The Court of

Claims had ample opportunity in the Motion for Rehearing to correct the blunder (R. 253, 254).

On page 6, the Solicitor General states that a question of general importance has not been presented. Laying aside for the moment the denial of due process (which is of serious and general importance by itself), we still have a central question of the Army's circumvention by Special Order of express Congressional language requiring "his consent" to retain a citizen on active duty in lower grade than his permanent commissioned grade. In a practical sense, the Court of Claims decision augments the already considerable arbitrary authority the Government exercises over lives of millions who are serving and will serve on active duty in the armed forces. It is of general importance that the metes and bounds of their rights be clearly defined. And it is particularly of general importance that these rights not be subject to abrogation by sharp practices such as exemplified in the instant case. The countenance of subterfuge to retain Reservists involuntarily in a grade lower than they consented to in violation of the express will of Congress can only adversely affect the morale of the Reserve Forces. Reserve officers were the vast majority of the officers who fought World War II and the Korean Conflict. They are the majority on active duty in the Cold War. And they will probably be so in the next war. Their morale is not only of general importance. It is of vital national importance.

The Court of Claims is constituted to adjudicate disputes between real or juristic persons and the United States. It is a Court constituted under Article III of the Constitution. As with other courts of primary jurisdiction, it is the responsibility of the Court of Claims to find probable facts from the evidence in any given case and apply the law to such facts. The proceedings utilized by the Court of Claims to determine such facts are essentially the same as those utilized by other courts. That is, where facts are in dispute, a hearing is held with

rights of confrontation and cross-examination. Here, however, the Court of Claims short-circuited the hearing and made its findings from inapplicable evidence not of record. The Solicitor General, instead of acknowledging the fictional basis for the Court of Claims decision in this case, as legal craftsmanship should recommend, has compounded the fiction by stating as fact that which the Court of Claims (as far afield as it was) only inferenced —and this from evidence not of record.

We thus have a case where the petitioner has been denied his day in court on the basis of matter not in evidence and which, were it in evidence, would completely demonstrate the fallacies of the findings by the Court of Claims.

Such perversion of due process should not be overlooked. The case should be returned to the Court of Claims so that the petitioner may have his day in Court.

The decision of the Court of Claims and argument of the Solicitor General have a disturbing Alice-in-Wonderland quality. If a reviewer in some future age should find the situation incredible, it is earnestly hoped that it will be considered as merely an atypical incident, not a symptom of the times.

Respectfully submitted,

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